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If the Supreme Court of Connecticut is correct, in its decision of Peck v. Hooker, refusing a *mandamus* to compel the State reporter of its opinions to furnish applicants with certified copies of opinions or to allow them to have copies made, the sooner the law of that State, on the subject indicated, is amended, the more creditable it will be for its law-makers. The case referred to was an effort on the part of a citizen of the State to obtain copies of supreme court opinions for early publication in the West Publishing Co. system of current reports. The statutes of the State provide that the reporter "shall make reports of the cases," and such reports when prepared shall be published and copyrighted "for the benefit of the people of the State." The court holds that it was the intention that the State should control the publication of the decisions and, that a statute providing for the reporter's compensation and allowing so much per page for copies of opinions, does not make it the duty of the reporter to furnish copies of decisions or to allow the same to be made, where such copies are intended for publication out of the State, in advance of their official publication. The court, while admitting the proposition now established by a long line of decisions, that no copyright can be had in judicial opinions, yet contends that it is for the State to say when and in what manner the decisions of its courts shall be published.

While this is unquestionably true, as to official publications, sanctioned by authority of the State, it strikes us that there is nothing in the statutes which unequivocally conveys the meaning that such opinions shall not be unofficially published inside or without the State, and that the view of the court is much strained. The right of access to public records, if not a common law right, is one which is now firmly established both by public sentiment and the decisions of this country. And that the opinions of the highest court of a State should not be susceptible of immediate publication and circulation, in order that "ignorance of the law," which excuses no one, may in fact be dispelled, is as oppressive as if the legislature provided for certain statutes to go into effect immediately on their passage, and then denied inspection, copy or publication of the engrossed acts in the hands of the secretary until after their publication. The fact that the official reports of the Connecticut decisions are some months behind their rendition, and that in every State of the Union except this one, and in all the federal courts the opinions are freely furnished and allowed to be published, makes the conclusion of the court the more unjust, and leads us to hope that whether the decision is right or wrong, the legislature of that State will correct the evil.

Hereafter there may be found judicial precedent for the view that tobacco is both a victual and a drink. In the case of Baker v. Jacobs, decided by the Supreme Court of Vermont, it appeared that the plaintiff, after the verdict had been rendered in his favor, treated the jury to cigars. This was held in violation of the statute which provides that if a party "obtaining a verdict in his favor shall during the term of the court in which such verdict is obtained, give to any of the jurors in the cause, knowing him to be such, any victuals or drink, or procure the same to be done by way of treat," etc., the verdict shall be set aside. The court held that treating with cigars was practically "giving drink by way of treat," and that the giving of a new trial was proper. The decision is undoubtedly in accordance with the spirit and intent of the statute. But the opinion of Taft, J., in the above case contains some very interesting and instructive reasoning. He says: "I concur in the result. Tobacco is both a victual and a drink. It is taken as a nourishment, sustenance, food, etc.; therefore a victual. It is not an obsolete use of the word to call it drink. Joaquin Miller says, 'I drink the winds as drinking wine.' If a man can drink wind I think he can drink tobacco smoke, vile and disgusting as it is. A man is compelled to drink it, by having it puffed in his face on all occasions and in all places, from the cradle to the grave. It is a drink. Set aside the verdict."

In Wiseheart v. Grose, 71 Ind. 260, however, an action to enforce a contract by a

son to "victual, clothe," etc., his father for life in return for the use of his farm, the court refused to consider that whisky and tobacco were included by either "victuals" or "clothes."

NOTES OF RECENT DECISIONS.

REMOVAL OF CAUSES—FEDERAL COURTS—PROCEDURE IN STATE COURTS.— In Roberts v. Chicago, St. Paul, M. & O. Ry. Co., 51 N. W. Rep. 478, the Supreme Court of Minnesota decide that when the defendant in an action in a State court files in the office of the clerk—the court not being in session—a petition and bond for removal of the cause to the Circuit Court of the United States, it is also incumbent on him to direct the attention of the court to the fact. Dickinson, J., says, after considering minor points:

We come now to consider the more serious question whether the mere filing in the office of the clerk of the State court in vacation, or when the court is not in session, of a petition and bond, which are on their face sufficient, the petitioner doing nothing further to call the attention of the court to this fact, or to invoke a suspension to the exercise of its jurisdiction, is effectual *ipso facto* to arrest or terminate that jurisdiction. Is that all that the statute contemplates? The question has arisen in the circuit courts of the United States, but the decisions have been conflicting. It will suffice to cite Osgood v. Railroad Co., 2 Cent. Law J. 275; same case, on reargument, 2 Cent. Law J. 283; Shedd v. Fuller, 36 Fed. Rep. 609; and Roberts v. Railway Co., 45 Fed. Rep. 433. The case last cited is that under consideration. It was remanded to the State court, because it was considered that the mere filing of the petition and bond in the office of the clerk of the State court (the proceedings not having been brought to the attention of the judge of that court) was not effectual to transfer the cause. We do not think that the question has been presented before or decided by the Supreme Court of the United States. Language may be found in the opinions of that court which, if it had been used with reference to the question here presented, would have an important bearing upon it; but, having been employed in treating of other questions, it cannot be regarded as expressing any opinion of that court upon the precise matter now before us. However, the question to be decided may be simplified by the statement of some propositions which may be regarded as settled by the decisions of that court. The right to remove a cause into the federal court, in the cases specified in the statute, is absolute; and the moving party may, by pursuing the course prescribed therein, effectually remove the cause without any consent or order or affirmative action on the part of the State court. If the petitioner complies with the requirements of the statute, and states in his petition facts which, if true, show, in connection with the record of the case, that he is entitled to a removal, the jurisdiction of the State court is thereby arrested, even though that court should refuse to recognize the right of removal. Railway Co. v. Dunn, *supra;* Stone v. State, 117 U. S. 430, 6 Sup. Ct. Rep. 799; Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. Rep. 62; Steam-ship Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. Rep. 58. It is conceded in this case that no order of the State court was necessary to effect the removal. It may be added, by way of possible qualification to the broad propositions above stated, that it does not seem to have been finally determined whether the State court has any authority to pass upon the sufficiency of the bond filed by the petitioner, either as respects its amount or the sufficiency of the surety, and to refuse to accept it, and to suspend the exercise of its jurisdiction, if the bond should be found to be in fact insufficient. But the tendency of the decisions to which we have already referred renders it probable that it will be decided that the court has no such authority, but that, if the bond is good in form, its sufficiency can only be questioned and passed upon in the circuit court. In the Removal Cases, 100 U. S. 457, the court declined to pass upon the question, it being found to be unnecessary. Nor do we find it necessary to consider the question in this case. The bond was proper in form, and the State court never considered whether it was in fact sufficient. For the purpose of this decision, we assume that the court had no right to determine anything in respect to the bond, save as to its sufficiency on its face. This being assumed, it may be stated broadly that, if the attention of the State court in this case had been called to the fact of the filing of the petition and bond, and it had been moved or asked thereupon to cease to proceed in the cause, it would have been bound to do so.

The statute providing how a removal may be effected is, and must necessarily be, somewhat arbitrary. Whatever it in terms requires to be done, or what it is to be construed as contemplating, is necessary. From the statute itself, keeping in mind the nature of the subject and the obvious purposes sought to be accomplished, we seek to discover what is required to be done by one who would avail himself of its benefits. We at once perceive that this is very briefly expressed; and the general principle of construction is not to be lost sight of, which requires that meaning and effect be given, if possible, to every expression found in the law. So reading the statute, we are inclined to the opinion that it is not enough for the moving party to merely file his petition and bond in the office of the clerk of the State court in vacation, or when the court is not in session, but that he should also in some way advise the court of this proceeding, before he can justly claim to have strayed or terminated the jurisdiction of that court, and to have effected a removal of the cause to the federal court. Prior to the proceedings in question, the State court had full jurisdiction in the cause. It not only had authority, but it was its duty, to proceed therein to hearing and judgment. The purpose to which the statute is directed is of a double nature. It is directed to the end of arresting—terminating—the jurisdiction of the State court, divesting that court of its authority to proceed, as well as of conferring upon the United States court jurisdiction in the cause. It contemplates as one of the principal ends in view that the State court shall cease to exercise its functions; but this it cannot be expected to do until in some way it is informed of the act of the party, which alone divests it of its jurisdiction, and converts its duty to proceed into a duty to "proceed no further in such suit." And the language of the statute may well be

regarded as disclosing the intention that the filing of the petition and bond for a removal should be in some manner brought to the attention of the court, in order that it might discontinue all further proceedings. Following the provision for making and filing a petition and bond in the State court, the statute declares: "It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit." It is contemplated that the court shall act intelligently upon the petition and bond; not necessarily by a formal approval of the same, if found to be sufficient upon their face, nor perhaps by the making of any formal order. But its jurisdiction and duty to proceed are not affected by the filing of any petition and bond, however defective, but only by the filing of such as are on their face legally sufficient. Railway Co. v. Dunn, 122 U. S. 516, 7 Sup. Ct. Rep. 1262. Stone v. State, 117 U. S. 430-432, 6 Sup. Ct. Rep. 799. Hence the court ought in every case to examine the petition and bond, to see whether they are legally sufficient, in order that, if found to be so, (but not otherwise), it may forbear to proceed further in the cause. The duty of the court, declared in the statute, to "accept" the petition and bond (being sufficient on their face), and to cease to further exercise its functions, implies that the court is to act upon them, which it cannot do until it is advised of the fact of their being filed; nor can it act intelligently until it shall have examined the record thus made, to see whether the requirements of the law have been complied with. If it had been intended that the mere filing of the papers with the clerk, who is only a ministerial officer of the court, should be sufficient of itself to stay the proceedings of the court, why was it added to the provision for filing that the court should accept the petition and bond, and cease its proceedings? This implies something more than had been expressed in the provision for filing such papers. If the law contemplates that the proceedings for removal shall be brought to the attention of the court in order that it may thus forbear, it is reasonable to say that the moving party—the petitioner who seeks by such means to put an end to proceedings legally pending in the State court—should see to it that this is done. If he presents his petition and bond to the court, and they are filed under its direction, that would be sufficient. But when, as probably must be deemed permissible, he files them with the clerk in vacation, we hold it to be necessary for him also to direct the attention of the court to the fact, in order that the obvious purposes of the law may be accomplished by the suspension of further proceedings in that court. The mere filing with the clerk does not, in itself, inform the court of the proceeding.

PLEDGE BY EXECUTOR—BANKS — COLLATERAL SECURITY—NOTICE.—The Court of Appeals of New York say, in Gottberg v. United States National Bank, that where a bank makes a loan to an executor individually, taking as collateral security registered bonds which belong to testator's estate, but the only fact apparent to the bank as to the borrower's character, and the ownership of the bonds, is the indorsement of registry in the name of executors on the bond immeidately preceding the registry in the name of the bank, this is not sufficient to put the bank on inquiry as to the executors' authority to pledge these bonds to secure the loan.

In order to charge the pledgee for misappropriation of securities by an executor, it is not necessary that such pledgee have direct evidence that the money is advanced to the executor for purposes not connected with the administration, but it is sufficient that there be brought to his knowledge facts sufficient to put a prudent man on inquiry.

The court adopts the opinion of Justice Barrett, filed in the Supreme Court below, and which was in part as follows:

Where one purchases property from a trustee, knowing that the subject is trust property, he is put upon inquiry as to the trustee's power to change or vary the securities. But one who purchases property from an executor is not necessarily put upon even this inquiry. "On the death of a testator," says Mr. Perry in his work on Trusts (section 809), "the personal estate vests wholly in the executor; and in order that he may execute his office the law permits him, with or without the concurrence of any co-executor, to sell or mortgage, by actual assignment or equitable deposit, with or without a power of sale, all or any part of the personal assets, legal or equitable." For this proposition numerous authorities are cited in the notes to the fourth edition, and the principle may be said to be well established. The distinction between a trustee and executor was referred to in Duncan v. Jaudon, 15 Wall. 175. In the former case, namely, that of a trustee, Justice Davis observed "that there is no presumption of a right to sell, as there is in the case of an executor." And in the same case below, reported under the name of Jaudon v. Bank, 8 Blatchf. 438, Justice Blatchford observed that "a trustee stands on a different footing from an executor or administrator, or even a guardian, in many respects. A trustee presumptively holds his trust property for administration, and not for sale."

Where, then, the securities show upon their face that they are trust property, the purchaser is put upon inquiry as to the power of the trustee to vary or change such securities. In the case of an executor, however, this power is presumed as a necessary incident to the performance of his duties, and the purchaser or pledgee is protected if he pays or advances his money in good faith, and without knowledge of any intended misapplication by the executor. What neither a trustee nor an executor can do, without peril to the purchaser or pledgee, is to dispose of or pledge his *cestui que trust's* or testator's assets in payment of or as security for a debt of his own. Field v. Schieffelin, 7 Johns. Ch. 150; Shaw v. Spencer, 100 Mass. 382; Petrie v. Clark, 11 Serg. & R. 377. In Field v. Schieffelin, Chancellor Kent examined all the English cases up to that date (1823), and his conclusion was that they all agreed that the purchaser is safe, "if he is no party to any fraud in the executor, and has no knowledge or proof that the executor intended to misapply the proceeds, or was in fact, by the very transaction, applying them to the extinguishing of his own private debt. The great difficulty has been," continued the chancellor, "to determine how far the purchaser dealt at his peril, when he knew, from the very face of the proceeding, that the executor was applying

the assets to his own private purposes, as the payment of his own debt. The latter and the better doctrine is that in such a case he does buy at his peril; but that, if he has no such proof or knowledge, he is not bound to inquire into the state of the trust, because he has no means to support the inquiry, and he may safely repose on the general presumption that the executor is in the due exercise of his trust." The rule was stated by Chief Justice Taney in Lowry v. Bank, Taney, 310, as follows: "If a party dealing with an executor has at the time reasonable ground for believing that he intends to misapply the money, or is in the very transaction applying it to his own private use, the person so dealing is responsible to the persons injured." And the same rule was put in another form by the house of lords, in 1861, in Walker v. Taylor, 4 Law T. (N. S.) 845: "Where an executor parts with any portion of the assets of the testator, under such circumstances as that the purchaser must be reasonably taken to know that they were sold, not for the benefit of the estate, but for the executor's own profit, the result is that the purchaser holds the assets as if he were himself, in respect of those assets, the executor." See, also, Leitch v. Wells, 48 N. Y. 585; Goodwin v. Bank, 48 Conn. 550; Cook, Stocks, 474, and cases there cited.

"The present case is analogous to McLeod v. Drummond, 14 Ves. 352, 17 Ves. 152, which was carefully analyzed by Chancellor Kent in Field v. Schieffelin. There was, in McLeod v. Drummond, a pledge by the executor of the testator's bonds upon advances of money. The bill, as here, was by a co-executor, and it was dismissed by the master of the rolls, and the decree was affirmed on appeal to the lord chancellor. The master of the rolls said he had found no case, where the money had been advanced at the time to the full value of the assets, that it was ever called back. Lord Eldon, on the appeal declared that, on a sale by the executor for money advanced at the time, the lender could never be affected by proving the executor's intention at the time to misapply the money. The third person, if there was no more in the transaction, would be justified in assuming that the sale was for those purposes for which the law gives the executor the power of sale. The conclusion, in substance, was that, to charge the purchaser, he must have had direct evidence that the advance was not for a purpose connected with the administration of the assets, but for a different purpose, and that the executor was going to misapply the fund. Both upon principle and authority, then, the plaintiff in the present case must fail. We will assume that the bank was bound to notice the manner in which the bonds were registered. What then? It simply advanced money to one of the executors upon the collateral security of the testator's bonds, registered in the name of the two executors. There was absolutely nothing more than this in the transaction. It is true that in form the advance was to John J. Louth personally. That is, he did not add the descriptive word 'executor' to his signature to the stock-note, nor did the bank add such word to the name of Louth as the payee of its check, nor did Louth inform the bank that he desired the loan for the purposes of the estate. But all this was implied upon the face of the transaction, and the bank is certainly not chargeable because its president supposed that he was dealing with Louth personally, when, if he had noticed the manner in which the bonds were registered, what transpired need not have been changed, even in matter of detail; for the debt contracted by Louth as executor was in law personal, and it would have been just as much personal whether he added to his signature to the stock-note his executorial description or not. The form of the transaction, therefore, was unobjectionable. It appropriately effected a loan to the estate, and, so far as it spoke at all, it spoke of a loan to the executor for the purposes of the estate. It did not, of itself, effect a misappropriation of the funds of the estate, and it certainly gave no hint to the bank of an intended misappropriation."

The Court of Appeals, in affirming this decision, qualify it somewhat, as follows:

The general term opinion practically adopted the opinion of the trial justice, except in the respect that they do not concur in a statement of the rule that, to charge a purchaser or pledgee from an executor, he must have had direct evidence that the money was not paid or advanced to the executor for a purpose connected with his administration of the assets, but for a different purpose. The general term rests the rule of liability upon the foundation of such notice as would put a party of ordinary prudence on inquiry, and do not limit it to a notice from the facts which disclose as a necessary conclusion, a guilty or fraudulent purpose. If the learned trial justice intended to narrow the rule, as the general term understood him to do, which seems, from a reading of his whole opinion, to be somewhat doubtful, then we agree in the correctness of their broader statement of the rule. The apparent facts of the transaction must be such as to put the intending purchaser or lender upon such inquiry as would suggest itself to an ordinarily prudent person; that is, the fact need not be such as, of themselves, to establish or compel the conclusion of some wrong purpose; but if they furnish reasonable ground for believing in the existence of some dishonest intention to misapply the moneys, or that the borrower is, in the very transaction, applying it to his own private use, then the party dealing with the executor becomes responsible to those who are injured. That seems to be the rule deducible from the cases which have been carefully collected and reviewed in the opinion below.

POWER OF A BUILDING ASSOCIATION TO BORROW MONEY.

The question whether or not a building association has the implied power to borrow money, has been a troublesome one. If it is invested with this right by statute, of course all doubt is removed, but the legislature rarely defines that right as it is considered incidental to ordinary corporations, and its exercise is left to the control of the courts. But a building association is not an ordinary corporation—in fact it exercises some extraordinary privileges, particularly in not being amenable to the usury laws. It is created for the declared purpose of accumulating money and lending the accumulations to its members to build or acquire homes for themselves. The legislature devised this plan of co-operative accumulations for the purpose of

assisting each member to become his own landlord. The State has a selfish motive in the promotion of a building association, as through its workings it is planting deeply the roots of citizenship. The drifting, thriftless classes are brought into a school of economy, and the earnest and economical classes are given an opportunity. There is then a formation of a steady, energetic and accumulative citizen. The cares of the State are lessened by decreasing pauperism and its prosperity is increased by growing material wealth. We may clearly conceive then that the intention of the legislature in the creation of building associations is, first, to encourage savings; second, to secure homes for the savers. Thus, considering the legislative intention, has the association the implied power to borrow money?

In England, the question was frequently before the courts prior to the act of parliament in 1874. Borrowing to a limited extent was held valid,[1] but when there was no rule of the association authorizing borrowing, it was held illegal to borrow, and a person who had advanced money to the trustees of a society under such circumstances was held not to be a creditor, legal or equitable, of the society, and therefore not entitled to a winding up order;[2] and if a rule did not fix a limit of the amount to be borrowed, it was held illegal.[3] So a rule authorizing unlimited borrowing was held *ultra vires*.[4] Where the limit was exceeded and the society derived no benefit from the loan, it was held that it was not liable, but that the directors were personally liable, as they had held out the treasurer as the agent of the society, although there was no fraud on their part.[5]

Where there was a rule authorizing the borrowing of money for the special purpose of making advances to the members who might have applied for them, and the society having borrowed a sum of money not actually required to meet applications at the time of the loan, it was held that the society had no power to take the loan.[6] And where the rules authorized the trustees to borrow for the purposes of the society, and the trustees borrowed money and spent it in a way that was held not to be for the legitimate purposes of the society, payment was not allowed to be enforced against the society.[7] Where there was no rule authorizing borrowing there was no power, but money advanced by a bank, which was the depository of the society which went to pay legal liabilities of the society, the claim was allowed. The rules gave the directors power to arrange for advances and their payments.[8] But where a lender has deeds belonging to some of the members deposited with him, the court refused to compel him to surrender the deeds without payment of the money for which they were held as security.[9] Unless the rule containing the power was certified by the registrar, a person loaning upon the faith of it could not enforce his claim against the society.[10]

Parliament in 1874 enacted a statute which expressly empowers a society to borrow under prescribed limits. Under that act, any society may receive deposits or loans at interest within the limits of the section from the members or other persons, or from corporate bodies, joint stock companies, or from any terminating building society, to be applied to the purposes of the society. In a permanent society, the total amount so received on deposit or loan, and not repaid by the society, shall not at any time exceed two-thirds of the amount for the time being secured to the society by mortgages from the members. In a terminating society the total amount so received and not repaid, may either be a sum not exceeding twelve months' subscriptions on the shares for the time being in force. This statute gives the society power to borrow within the limit fixed,[11] and is evidently the result of experience among English societies that their purpose can better be accomplished by limited authority to borrow. As will be observed by the decisions prior to this act, the courts permitted them under certified rules within a reasonable limit to borrow if the provisions of the rules were strictly observed,

[1] Laing v. Reed, L. R. 5 Ch. App. 4.
[2] *In re* National, etc. Society, *Ex parte* Williamson, L. R. 5 Ch. App. 309.
[3] *In re* Victoria, etc. Society, L. R. 9 Eq. 605.
[4] *In re* Liverpool, etc. Society, 15 S. J. 177.
[5] Chapleo v. Brunswick, etc. Society, L. R. 6 Q. B. Div. 696.
[6] Moye v. Sparrow, 22 L. T. Rep. (N. S.) 154.
[7] *In re* Durham Co., etc. Society, L. R. 12 Eq. 516.
[8] Liquidator of the Blackburn, etc. Society v. Cunliffe, 52 L. J. Rep. Ch. 92.
[9] Wilson's Case, L. R. 12 Eq. 521.
[10] *In re* Coetmor, etc. Society, 51 L. T. 253.
[11] But if the limits are fixed smaller, they must be observed. Looker v. Wrigley, L. R. 9 Q. B. Div. 397.

but as statutory authority more fully estab lished the confidence of the lender in such securities, the right was incoporated in an express statute, substantially as the courts had been holding during the prior half century.

The principles underlying the English cases, are recognized and affirmed in this country. The implied power to borrow within restrictions have never been denied, except in a case in Ohio.[12] In that case the court considers that associations are not affected by the doctrine that corporations possess the power to borrow money which may be needed in the transaction of necessary business, but that the money to be loaned by associations can only be properly accumulated in the manner contemplated by statute, that is, by dues. fines, premium and interest. In other courts it has been held that associations have implied power to borrow money for legitimate purposes.[13] So that an association not being prohibited by statute or by by-law from borrowing money, may on maturity of a series of stock borrow money to pay the shares of the non-borrowing members of such series, instead of accumulating funds to pay off such series.[14] And the association having the express power to borrow has, in the absence of express prohibition, the implied power to assign its mortgages as security for the loan.[15] The association would be estopped by the receipts and application of the money to a legitimate purpose of the corporation from setting up in an action to recover it, a want of power in the corporation to make the loan. The corporation cannot reap the benefit of the money loaned and then allege a want of power to make it.[16] The directors of the association being by its by-laws empowered to manage its affairs, the corporation cannot defeat the recovery of money borrowed by directions of the directors on the ground that the directors applied the money to an unauthorized purpose, unless the lender knew such purpose was unauthorized.[17]

The unquestioned weight of authority in America, is to give building associations the incidental right to borrow. The question of the right to borrow is to be determined by inquiring into its objects and purposes. It has conferred upon it those incidental rights that are consistent and reasonably necessary to carry on its business. The vital question is: Is borrowing necessary to accomplish its objects? If it is, then, upon principle and authority, it may borrow.

The current of English decisions prior to this act of 1874, is that it has a restricted right. The American cases excepting the Ohio case, draw the same conclusion. Those courts consider the borrowing power necessary from the nature of its business and hold it granted by implication of law. It may be necessary to protect its interests as a junior lien holder or to satisfy the demands of borrowers. If the association is unable to supply borrowers from its regular fund, a temporary loan will satisfy the members, and when idle money accumulates, the association can pay off its debt. Borrowing is only intended as an expedient. To become a permanent borrower, is not a part of the corporate plan of an association and is not contemplated by the decisions investing the power to borrow in the association. Under proper limitation, it is sanctioned by the courts. That limitation is that the money is to be applied to an authorized purpose, yet under the decisions, the association cannot escape its obligation to repay because it applied the money to an unauthorized purpose, unless it can show that the lender had knowledge of this. The right of the association to borrow, is thus settled upon authority, and it rests further upon sound reasoning. It rests upon the doctrine of implied power, and there is no substantial variance between the application by the courts of that doctrine to building associations and other corporations.

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[12] State v. Building Ass'n, 35 Ohio St. 258. The opinion in this case is not founded upon reasoning or authority, and absolutely ignores the English cases. It is not entitled to much weight as an authority.

[13] Davis v. West Saratoga, etc. Union, 32 Md. 285; Jones v. Building Ass'n, 94 Pa. St. 215; Jackson v. Myers, 43 Md. 245; Muth v. Dolfield, 43 Md. 406.

[14] North Hudson, etc. Ass'n v. First Nat. Bank (Wis.), 47 N. W. Rep. 300.

[15] *Ibid.*

[16] *Ibid.* Jones v. Building Association, *supra;* Loan Co. v. Conover, 5 Phila. 18.

[17] North Hudson, etc. Association v. First National Bank, *supra.*

INFANT'S SERVICES—COMPENSATION.

JAMES V. GILLEN.

Appellate Court of Indiana, February 2, 1892.

In a suit by a niece against her uncle's estate for compensation for services, it appeared that, when fifteen years old, she went, at her uncle's request, to live with him and his maiden sister; that the household work was done by her aunt and herself; that her food and clothing were furnished by her uncle, and that she was treated in all respects as a member of the family, but that there was no agreement or understanding as to compensation. *Held*, that it was error to charge that the rule that where persons stand in the family relation to each other, there is ordinarily no implied promise to pay for services, will "not apply to infants, for they cannot be bound by the implied contract growing out of such relation."

CRUMPACKER, J.: Mary Gillen filed a claim against the estate of Sarah Dougherty, deceased, of which John H. James is administrator, for work and labor performed for said decedent from the 1st day of August, 1883, to the 30th day of August, 1887. The cause was tried by a jury, and a verdict returned in favor of the claimant, upon which judgment was rendered. The evidence showed that the decedent and her brother, Henry Dougherty, were both unmarried, and past the meridian of life, and they owned adjoining farms in Putnam county. There was a house upon the decedent's farm, and she and her said brother entered into an agreement whereby they were to live together in said house, and maintain a household; the brother agreeing to look after the farm, and furnish all of the provisions and clothing, and the decedent was to attend to the household affairs. This arrangement had continued for a number of years prior to the decedent's death, which occurred in the latter part of August, 1887. In 1881 or 1882, a sister of these parties died, leaving a family of four small children, the oldest being the appellee, who was then 12 or 13 years of age. Soon after the death of this sister, Henry Dougherty and the decedent took the three younger children into their family, and cared for them. Appellee lived with her father and another uncle until the 1st of August, 1883, when the decedent's health began to decline; and at the request of Henry Dougherty appellee also went to their home, and lived there with her uncle and aunt and brothers and sisters until the death of the aunt, as aforesaid. Appellee was 15 years of age at that time; and the decedent's health was very poor, so that she was unable to do much, if any, of the household work, and the burden of it was thrown upon appellee and her sister, two years younger than she. They continued to live in this manner, Henry Dougherty furnishing the provisions and clothing for all of the family. The decedent was a paralytic, and continued to grow worse gradually until she became quite helpless, and required a great deal of care and attention, and services were required in caring for her which were very disagreeable. Henry Dougherty, appellee, and her sisters and brothers, all assisted in waiting upon the decedent after she became helpless, and appellee and her sister undertook the burden of the household work, which they performed in a very satisfactory manner. There was evidence tending to show that they all lived as a common family, and that the appellee assisted in making clothes for and caring for her brothers; that she was nursed through a spell of sickness; that she went in society and to church, and was clothed and provided for as well as the average girl of her age and station in life in that vicinity, and that Henry Dougherty treated her with that kindness and consideration with which a parent would have treated a child. He was her guardian during the time she lived there. There was no contract or agreement whatever about compensation, or the terms upon which appellee was to live with her uncle and the decedent; and she kept no account of any kind, and never said anything about wages during the life-time of the decedent. Upon the other hand, there was evidence tending to prove that appellee was compelled to perform work that was extraordinary hard and distasteful, and which pertained to the station of a household servant or a nurse, rather than a child; that she was not sent to school, and was very poorly clothed. Also, on one occasion, Henry Dougherty, as her guardian, charged her with four dollars for medical treatment procured for her. The guardian, in explanation of this charge, said she visited at a neighbor's house, where the inmates were afflicted with measles, in disobedience of his instructions, and that he warned her in advance that if she became sick he would not pay the physician's bill; that she contracted the measles, and he charged her with the expense of the attending physician. The jury found that appellee's services were worth $500 more than the cost of her maintenance.

Among other instructions, the court gave the jury the following, which is very vigorously assailed by counsel for appellant: "It is a rule of law that when persons stand in the relation towards each other occupied by the plaintiff and the deceased,—that of aunt and niece, living together as members of a common family,—there is no obligation to pay for services rendered on the one hand, and for board, lodging, and clothing on the other, without there be an express promise to pay, or the circumstances be such as to raise an implied promise; but this rule does not apply to infants, for they cannot be bound by the implied contract growing out of such relation." The objection urged against this instruction is that, while it states the general doctrine respecting the family relation correctly, it erroneously declares that it does not apply to infants, where the relation is assumed. A minor is not bound by his express contract to perform services, and may at any time renounce it, and recover the value of the services performed, regardless of the contract. This proposition is so familiar and well settled in this State that no citations are needed to support it.

It is insisted in defense of the action of the court that, if a minor may disaffirm his express contract, he may, upon the same principle, disaffirm one arising by implication of law, and that in the family relation created by the act of the parties there is an implied agreement that services upon the one hand shall compensate for maintenance upon the other, and *vice versa*. Before there can be a recovery for work and labor in any case, there must be established some kind of a contract, either express or implied. No one can be lawfully charged for services performed for him, except upon the theory of a promise to pay for such services. Where there is no express agreement, but the services are performed upon the one side and accepted on the other under such circumstances that reason and justice would dictate that they should be paid for, the law will imply a promise and permit its enforcement. Where the relation of the parties is such that compensation, according to human intercourse, is ordinarily given and received, the law will create a promise to pay. This is generally the case where there appears to be no other adequate motive than the expectation of reward to prompt the performance of the service. But where its performance may be accounted for upon grounds more probable than the hope of pecuniary reward, such as acts of kindness and affection between members of a common family, prompted by a sense of love and duty, no promise to pay will be implied. Thus it was said by a court in Davidson v. Gas-Light Co., 99 N. Y. 558, 2 N. E. Rep. 892: "A promise to pay for services is sometimes implied by law, but this is done only when the court can see that they were rendered under such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party soliciting the performance." In the case of Woods v. Ayres, 39 Mich. 345, the court said: "Where there is a spontaneous service as an act of kindness and no request, or where the circumstances account for the transaction on some ground more probable than that of a promise of recompense, no promise will be implied. The contract connection is not established." Upon this principle it is universally held, in all cases where the family relation exists, whether natural or assumed, in the absence of an express agreement or circumstances from which an agreement may be fairly inferred, that no promise will be created by implication of law to pay for services upon one hand, or for support upon the other. This rule of law has its foundation in the theory that the relation repels the legal inference of contract, rather than in an implied understanding that the services should compensate and be compensated by the maintenance. It is the policy of the law to inculcate harmony, confidence, and affection in the domestic relation, and this can better be accomplished by permitting the sense of filial regard in a large measure to regulate the hearthstone economy, than by reducing it to a mercenary basis by applying the rules relating to master and servant. The doctrine applies with peculiar force to parent and child, and those occupying the relation by arrangement or adoption, and continues as long as the relation exists, regardless of the age of the parties. Davis v. Davis, 85 Ind. 157; Smith v. Denman, 48 Ind. 65; Hays v. McConnell, 42 Ind. 285. Nearness of kinship is influential only in determining whether the family relation does in fact exist; but, after such relation is once established, and the parties live as members of a common family, the rule is the same, regardless of the questions of consanguinity or affinity. Thus it was said by Cooley, J., for the court, in Thorp v. Bateman, 37 Mich. 68: "The presumption always is, when a child is thus taken into a family, that neither support nor services are expected to be compensated, except as the one compensates the other; in other words, that the child comes in as a member of the family, and for the time being occupies substantially the same position as would a member of the family by nature." This principle seems to be generally recognized in this country and England, and courts apply it with much vigor and strictness. Counsel for appellee admits its application to parent and child in the natural relation, and to all members of a common family except infants by adoption. The argument is that the arrangement which creates the relation, and carries with it these consequences, is contractual, and may be disaffirmed by the infant. We cannot concur in this view. In our opinion, upon considerations of public policy, the reasons are stronger in favor of the application of the doctrine to infants than to adults. The law recognizes the home as the most potent refining and humanizing agency known to our civilization, and its policy is to encourage the extension of its hospitalities to those who by the hand of misfortune may have been deprived of its protection and beneficent influences. But, if one, out of a benevolent disposition, should adopt a parentless child into his family as a member thereof, and faithfully perform the office of parent to it, and the child, upon reaching its majority, should be permitted to convert the relation into that of master and servant, and recover whatever a court or jury might conclude the services were worth over and above the cost of support in dollars and cents, the result would be deplorable. It would close all of the private homes of the country against the orphan. The only case cited which supports this mischievous doctrine is Garner v. Board, 27 Ind. 323, and the authorities cited in that case in support of the decision all relate to the disaffirmance by an infant of an express contract for labor. The court evidently lost sight of the important distinction between the relations of parent and child and master and servant.

In a large sense the law is the guardian of the infant, and permits him to assume with another the relation of parent and child without involving contractual obligations upon the part of either, upon the theory that such arrangement is beneficial to the infant. The case of Williams v. Hutch-

inson, 3 N. Y. 312, was an action to recover wages for services performed by the plaintiff during his minority. The defendant stood *in loco parentis* to him; but it was contended that the infant could disclaim the relation, and recover upon an implied promise to pay. This doctrine was denied, the court saying: "The counsel for the appellant assumes that the plaintiff, because he was an infant, could not consent to any arrangements by which he should waive the right to claim wages for his services. This is not correct. An infant may enter into a binding contract which is clearly for his benefit. * * * It being clearly for the benefit of the infant that he should be provided with a home, any contract beneficial to himself which he might make for that purpose would be binding." Again, the court said: "The referee, it is true, has found in dollars and cents the value of the services exceed the cost of maintenance; but these are not the only benefits which the plaintiff has received. There are considerations growing out of the relation which the parties sustain to each other which cannot be computed in money." The same question was decided in the same way by the Supreme Court of Vermont in the case of Ormsby v. Rhoades, 59 Vt. 505, 10 Atl. Rep. 722. In the latter case the court based the decision upon the ground that an infant could enter into a binding contract for necessaries, and was therefore bound by the arrangement which established the relation of parent and child. In the case of Hudson v. Lutz, 5 Jones (N. C.), 217, the court held an infant bound by such arrangement. In speaking of the plaintiff's claim, the court quoted approvingly the language of Ruffin, J., in Williams v. Barnes, 3 Dev. 349, as follows: "Such claims ought to be frowned on by courts and juries. To sustain them tends to change the character of our people, cool domestic regard, and in the place of confidence sow jealousies in families." The same principle received the unqualified sanction of the court in each of the following cases: Starkie v. Perry, 71 Cal. 495, 12 Pac. Rep. 508; Gerber v. Bauerline, 17 Or. 115, 19 Pac. Rep. 849; Mobley v. Webb, 83 Ala. 489, 3 South. Rep. 812; Dodson v. McAdams, 96 N. C. 149, 2 S. E. Rep. 453; Defirance v. Austin, 9 Pa. St. 309; Barhite's Appeal, 126 Pa. St. 404, 17 Atl. Rep. 617; Ryan v. Lynch, 9 Mo. App. 18; Williams v. Williams, 132 Mass. 304; Smith v. Johnson, 45 Iowa, 308; Wyley v. Bull, 41 Kan. 206, 20 Pac. Rep. 855; Weir v. Weir, 3 B. Mon. 645. In this State an infant is liable upon an implied contract for necessaries, though he is not bound by his express contract, as the consideration may be always inquired into. Ayers v. Burns, 87 Ind. 245; Price v. Sanders, 60 Ind. 310; Henderson v. Fox, 5 Ind. 489. It is impossible to estimate the value of the comforts, discipline, and training of the home upon a pecuniary basis, and we think the correct rule is that in the domestic relation, though assumed, the parties do not occupy the contractual *status*, and there is no basis for implied promises upon either hand. The law will permit one to assume the relation of a parent towards an infant, and, if he honestly and faithfully performs the obligations incident thereto, the infant will not be allowed to convert the relation into master and servant. This relation implies mutual obligations and duties, and if the foster parent should disregard his obligation, and impose burdens upon the infant without supplying the corresponding benefits of a home and proper training, the relation would be destroyed, as it would be unjust for the parent to exact the fulfillment of the obligations of a child, and give in return only such support and protection as would be due from a master to a servant. While the case of Garner v. Board, *supra*, has not been expressly overruled, it has been overruled in effect by later decisions of the supreme court in this State, in which the doctrine of this opinion has been recognized, by implication at least, as applicable to infants. Lockwood v. Robbins, 125 Ind. 398, 25 N. E. Rep. 455; Wright v. McLarinan, 92 Ind. 103; Brown v. Yaryan, 74 Ind. 204; Medsker v. Richardson, 72 Ind. 323; Hays v. McConnell, 42 Ind. 285. In the case before us, whether the parties lived together as members of a common family or as master and servant is a mixed question of law and fact, and belongs to the jury, under proper instructions from the court. If they lived in the former relation, there could be no recovery in the absence of an express contract, or circumstances from which it is reasonably apparent that compensation was expected on the one hand and intended to be given on the other. It follows that the court erred in giving the instruction. We intimate no opinion upon the sufficiency of the evidence to support the verdict, as the cause will be tried upon another theory, and that question may not arise again. The judgment is reversed, with instructions to grant a new trial.

NOTE.—Cases of this kind are largely questions of fact. Generally the contest is as to whether the law will imply a contract to pay for the services from the relations of the parties, and the decision necessarily turns upon the peculiar facts of each case. Ordinarily where one accepts and retains the beneficial results of another's services, the law will imply a previous request for the services and a promise to pay for them. Moreland v. Davidson, 71 Pa. St. 371; Perry v. Bailey, 12 Kan. 539; Ford v. Ward, 26 Ark. 360; Chamness v. Cox, 28 N. E. Rep. 777. This presumption, however, may be rebutted by evidence that the relation between the parties was such as to exclude the inference that they were dealing on the footing of contract. Chamness v. Cox, 28 N. E. Rep. 777. Sometimes it has been said that where there exists a family relationship between the parties, the usual implication of a promise to pay for performance of valuable service does not obtain, and it devolves on the plaintiff to show a contractual relation, express or implied. Callaghan v. Riggins, 43 Mo. App. 130. Thus the fact that a woman on the death of her father goes to live in the family of a relative and there performs household duties for sixteen years without payment or settlement for services, was held to preclude her right to recover for such services without showing an express contract to pay for them. Collar v. Patterson, 27 N. E. Rep. 604. See

also Miller v. Miller, 16 Ill. 296; Byers v. Thompson, 66 Ill. 421; Faloon v. McIntyre, 118 Ill. 292, 8 N. E. Rep. 315; Briggs v. Briggs, 46 Vt. 571.

As to adult children the general rule is that, where the child after reaching majority resides with the parent or person *in loco parentis* as a member of the family rendering services, the law does not imply an obligation to pay for them. On the contrary, the presumption is that no pecuniary compensation as wages is to be paid. Ulrich v. Ulrich, 17 N. Y. Supp. 721; Reynolds v. Reynolds, 18 S. W. Rep. 517; Grant v. Grant, 14 S. E. Rep. 90; Freeman v. Freeman, 65 Ill. 106; Harris v. Smith, 44 N. W. Rep. 169; Woods v. Land, 30 Mo. App. 176; Ellis v. Carey, 42 N. W. Rep. 252, 74 Wis. 176. That presumption can only be rebutted by clear evidence of an express or implied contract to pay for such services. Mere vague statements on the part of the parent that the child was a good child and should be well paid are insufficient. Reynolds v. Reynolds, 18 S. W. Rep. 517; Zimmerman v. Zimmerman, 129 Pa. St. 922, 18 Atl. Rep. 129; Leidig v. Coover, 47 Pa. St. 530; Dodson v. McAdams, 96 N. C. 149, 2 S. E. Rep. 453; Woods v. Land, 30 Mo. App. 176; Appeal of Barhite, 17 Atl. Rep. 617, 126 Pa. St. 404; *Re* Kirkpatrick's Estate, 13 S. E. Rep. 450. But see Walters v. Mayhew, 8 N. Y. Supp. 771. But an express contract to pay for the services is sufficient (McLaughlin v. McLaughlin, 23 Atl. Rep. 400; Hiatt v. Williams, 72 Mo. 214); and the mere fact that the relation of parent and child exists between the parties will not exclude the idea of an implied contract to compensate for services, if the situation of the parties in other respects is such as to render it the reasonable and natural implication from their acts. Thus, where a daughter keeps house for her father, and takes care of him for a period of years beginning after she has reached her majority, and continuing until his death, and her services are rendered at her father's request, and with the intention on both sides that she should be paid for them, and the father states that he intends to pay her therefor, but does not do so, she can maintain a claim therefor against his estate. McCormick v. McCormick, 28 N. E. Rep. 122. See also Resor v. Johnson, 1 Ind. 100; House v. House, 6 Ind. 60; Adams v. Adams, 23 Ind. 50; Smith v. Denman, 48 Ind. 65; Botts v. Fultz, 70 Ind. 396; Hilbish v. Hilbish, 71 Ind. 27; Hill v. Hill, 121 Ind. 255, 23 N. E. Rep. 87; Webster v. Wadsworth, 44 Ind. 283; Daubenspeck v. Powers, 32 Ind. 43; King v. Kelly, 28 Ind. 89; Cauble v. Ryman, 26 Ind. 207; Pitts v. Pitts, 21 Ind. 309; Story v. Story, 27 N. E. Rep. 573; Freeman v. Freeman, 65 Ill. 106; Reands v. Misplay, 90 Mo. 251; Morton v. Rainey, 82 Ill. 215; Davis v. Gallagher, 9 N. Y. Supp. 11, 55 Hun, 593; Wilsey v. Franklin, 10 N. Y. Supp. 832, 57 Hun, 382. But where a child, after attaining his majority, remains with his parent or one *in loco parentis* in the same apparent relation, as when a minor, the presumption is that the parties do not contemplate the payment of wages for services rendered. Such presumption, however, will be rebutted by an express contract to pay an agreed compensation. Stock v. Stolz, 27 N. E. Rep. 604; Faloon v. McIntyre, 118 Ill. 292, 8 N. E. Rep. 315.

Even in that very numerous class of cases in which the plaintiff suing for compensation was, at the time the services were rendered, an infant, and the defendant was his parent or one who stood to him *in loco parentis*, the difference is simply in the degree of proof, which in such a case is required to remove the presumption that the services were intended by both parties to be rendered gratuitously. Brown v. Yaryan, 74 Ind. 305, and cases cited; Marquess v. La Baw, 82 Ind. 550; Wright v. McLarinan, 92 Ind. 103; Morton v. Rainey, 82 Ill. 215. In the case of a claim against a decedent's estate where it appeared that the claimant was decedent's niece and had lived as a member of his family since she was sixteen years of age, it was held proper to show, in order to rebut the presumption that such services were rendered gratuitously, that she went to live in his home under a promise to her and her parents that she should take the place of his deceased daughter in his house and affections, and that he would educate, clothe and support her as his own daughter and would make her an heir to his estate equal to his two sons, and that during the time she was with the decedent he frequently expressed an intention of providing for her by will or otherwise, although the promise was not kept and was void under the statute of frauds. Nelson v. Masterson, 28 N. E. Rep. 731. Where there is no relationship between the parties nor any moral obligation to render service, the only natural presumption is that the infant's services were performed in return for his support and maintenance and the advantages of home life within the family circle, and where these are not afforded him, where he is not taken into his employer's family and treated as a member of it, although he may have received his board and clothes, no presumption that his services were intended to be gratuitous will arise and he may recover their value notwithstanding there was no contract for compensation. Lockwood v. Robbins, 25 N. E. Rep. 455.

BOOK REVIEWS.

SPELLING ON PRIVATE CORPORATIONS.

The title page tells us that this is a treatise on the law of private corporations, divided with respect to rights pertaining to the corporate entity as well as those of the corporate interests of members, remedies for the enforcement and protection of these rights and interests, and legislation amending and repealing charters regulating rights and conduct of business and taxing stock franchises and other corporate property, containing a full and complete exposition of principles both ancient and recently developed with reference to authorities in England and all the States down to date of publication.

The author very frankly admits that he cannot justify this effort on the ground that there is a dearth of text-books on the law of private corporations, and yet we agree with him that the subject is one of such vast proportions and of such growing interest, that it will be a difficult matter to bring to bear too much light on the subject.

This work is divided into two large volumes of 600 pages each. The mapping out of the subject into chapters and the division of the chapters into subheads has been admirably done. There is a clearness and a comprehensiveness in its scope and arrangement which shows considerable thought and study. The style of the author is pleasing and very clear. The notes illustrative of the text exhibit care and research. We commend the work as being a valuable addition to the law on the subject of private corporations.

The printing and binding of the volumes are in every respect creditable to the publishers, L. K. Strouse & Co. New York.

OSTRANDER ON FIRE INSURANCE.

This is not oply a work on the defined and distinct subject of fire insurance, but it is a discussion of cases within that subject and not embracing it entirely. We

gather this both from the scope of the work and from the author's statement, who says its purpose is to present "in a familiar manner, the more complicated and less understood questions which in the construction of the insurance contract will sometimes call for consideration with such illustration of legal rules and principles as may be afforded by a large number of instructive cases that have been carefully analyzed and decided by the English and American courts."

The book treats of contracts of fire insurance, of title, alienation and incumbrance, of the payment of premium, partnership, subrogation, of warranties and representations, of vacant or unoccupied property, of adjustment, of notice and proofs of loss, of other insurance, arbitration, of explosions and explosives, waiver and estoppel, and remedies.

Such an examination of the work as we are able to give, justifies us in the assertion that the book is more an analytical discussion of certain recent cases upon the subjects presented than a text book embracing all the authorities. Indeed, we believe the author does not claim to be exhaustive even in the citation of authorities. The text is well written and there is considerable thought manifested throughout the work. Unlike most books, the cases are cited following the text and not in foot-notes, a practice which does not commend itself to us. The index is very good and the insurance lawyer will undoubtedly find within its pages, much fruitful matter.

The book is published by Rollins Publishing Co., Chicago.

AMERICAN STATE REPORTS, Vol. 22.

Each volume of this standard series of reports keeps up and strengthens the reputation of its predecessor. There is no diminution of vigor or excellence. On the contrary, there is apparent a constant effort to improve. Of the many valuable cases in the volume before us, we make especial mention of Gainesville, etc. Railway Co. v. Hall (Texas), on the subject of damages to property from the construction and operation of public works, with an exhaustive note on eminent domain. Baird v. Shipman (Ill.), on subject of agent's personal liability to third person for negligence, with very complete note. Hahlo v. Mayer (Mo.), on the subject of the liability of one held out by others as a partner. The latter case has an especially interesting note.

BOOKS RECEIVED.

SKILL IN TRIALS: Containing a variety of Civil and Criminal Cases won by the Art of Advocates; with some of the skill of Webster, Choate, Beach, Butler, Curtis, Davis, Fountain and others, given in sketches of their Work and Trial Stories, with new selections of Western Eloquence. By J. W. Donovan, Author of "Modern Jury Trials," "Trial Practice," "Tact in Court," etc. Rochester, N. Y.: Williamson Law Book Company. 1891.

THE FEDERAL POWER OVER COMMERCE, and its Effect on State Action. By Wm. Draper Lewis, Ph.D., Member of the Philadelphia Bar. Philadelphia: University of Pennsylvania Press. 1892.

A TREATISE ON THE LAW OF IDENTIFICATION, a Separate Branch of the Law of Evidence. Identity of Persons and Things, Animate and Inanimate; the Living and the Dead; Things Real and Personal, in Civil and Criminal Practice; Mistaken Identity; *Corpus Delicti*; *Idem Sonans*; Opinion Evidence. By George E. Harris, of the Washington, D. C., Bar, and the Bar of the United States Supreme Court. Albany: H. B. Parsons, Law Book Publisher. 1892.

AMERICAN STATE REPORTS, Containing the Cases of General Value and Authority, Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States, Selected, Reported, and Annotated. By A. C. Freeman and the Associate Editors of the "American Decisions." Vol. 23. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1892.

THE LEGAL AND MERCANTILE HAND-BOOK OF MEXICO. Written and Edited by A. K. Coney, Consul-General of Mexico at San Francisco, Cal., and Jose F. Godoy, Attorney at Law and Vice Consul of Mexico at San Francisco, Cal. San Francisco: Bancroft-Whitney Co. 1892.

COMMENTARIES ON THE LAW OF SALES and Collateral Subjects. By Jeremiah Travis, LL.B., Harvard, '66, Recently Judge of the High Court of Justice of the Canadian Northwest Territories, First Prize Law Essayist of Harvard University of 1866, Author of "A Treatise on Canadian Constitutional Law," Annotator of "Parsons on Partnership," etc. In two volumes. Vols. I and II. Boston: Little, Brown & Co. 1892.

THE QUESTION OF SILVER, Comprising a brief Summary of Legislation in the United States, together with a Practical Analysis of the present situation, and of the Arguments of the Advocates of Unlimited Silver Coinage. By Louis R. Ehrich, of Colorado. G. P. Putnam's Sons. New York: 27 West Twenty-third street; London: 24 Bedford street; Strand: The Knickerbocker Press. 1892.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. APPEAL — Jurisdictional Amount.—An action to foreclose a mechanic's lien being an equitable proceeding, an appeal therein will lie to the supreme court, though the judgment appealed from does not exceed $200.—*Fox v. Nachtsheim*, Wash., 29 Pac. Rep. 140.

2. ATTACHMENT.—Where plaintiff purchased from H property levied on under an attachment against H, and

shall be consolidated, and that if a verdict is found there shall be but one verdict, it cannot afterwards complain of the consolidation, although the court, against its objection, ruled that there should be a separate verdict for each plaintiff.—*Union Pac. Ry. Co. v. Jones*, U. S. C. C. of App., 49 Fed. Rep. 343.

12. CHATTEL MORTGAGE—Rights of Loan Agent.—An agent who loans the money of others, taking promissory notes, with personal security, and guaranties the payment of the notes, can take a chattel mortgage in his own name to secure the payment of such notes, or can maintain an action in his own name to enforce payment of the notes, or can enforce the conditions of a chattel mortgage taken in his own name to secure the payment of such notes; and such a chattel mortgage, on record before the levy of an attachment on the mortgaged property of the debtor, is a prior lien to the attachment levy.—*Consolidated Barb-iwre Co. v. Purcell*, Kan., 29 Pac. Rep. 160.

13. CLAIMS AGAINST DECEDENT'S ESTATE.—Under Gen. St. § 581, which provides that, where a right of action shall accrue against an estate after the death of the deceased, it shall be exhibited within four months after such right accrued, the limitation does not commence to run until there is an administrator to whom the claim may be exhibited.—*In re Cowles' Estate*, Conn., 23 Atl. Rep. 829.

14. CONSTITUTIONAL LAW—Titles of Acts.—In an action founded on a penal statute, the subject of any exception in the enacting or prohibitory clause of the act must, in the declaration, be excluded by averment. But of any proviso or qualification in a separate substantive clause the declaration need not take notice; that must be introduced by way of defense.—*Clark Thread Co. v. Board of Chosen Freeholders of Hudson County*, N. J., 23 Atl. Rep. 820.

15. CONTRACT — Assumpsit.—Where a member of a firm takes goods from the store, and sends them to a store of his own, charging himself with only a part of them, in *assumpsit* for the goods after dissolution the jury may find that the packages with which he was not charged contained the same kind of goods as similar packages with which he was charged, and that the goods were of as high quality as any with which he was charged.—*McCown v. Quigley*, Penn., 23 Atl. Rep. 805.

16. CONTRACT—Consideration.—An agreement to do, or the doing of, that which a person is already bound to do, does not constitute a sufficient consideration for a new promise.—*Schuler v. Myton*, Kan., 29 Pac. Rep. 163.

17. CONTRACT—Parol Evidence.—Where a contract for the sale of land provides that $7,000 of the purchase price is to be paid in "original ground floor or treasury stock" of a corporation into which the land is to be put by the purchaser, parol evidence is inadmissible in a suit by the seller on the contract to show that it was agreed that the land should be put in at a certain price, and that if it was put in at a greater price the seller was to receive a greater amount of stock than $7,000.—*Williams v. Searcy*, Ala., 10 South. Rep. 632.

18. CORPORATION — Creditors — Priority.—Where a manufacturing company domiciled in another State entered into a contract with an agent for the establishment of a branch of its business in this State, under which he carried on the business in his own name, with the knowledge and consent of the company, and under which he contracted a large amount of indebtedness, and thereupon made an assignment for the benefit of his creditors, *held*, that a creditor of the company was not entitled to a preference over the creditors of such agent by reason of the fact that moneys received from the company had been used in his business, or in the purchase of the assigned property before the indebtedness to such creditor had accrued.—*Mackellar v. Anchor Manuf'g Co.*, Minn., 51 N. W. Rep. 616.

19. CORPORATIONS—Subscription to Stock.—Defendant and others, for the purpose of forming a corporation, agreed to "subscribe for stock to the amount set opposite to our respective names; amounts to be due and received a bill of sale, and placed the same on record, he was entitled to the possession of such property as against another and subsequent attaching creditor of H, even though at the time of such other attachment the property was still in the hands of the sheriff, and had not been released from the prior attachments.—*Dixon v. Barnett*, Wash., 29 Pac. Rep. 209.

3. ATTACHMENT—Disclaimer of Property.—Under the provisions of Mansf. Dig. Ark., a defendant in attachment may move to vacate the attachment though he disclaims any interest in the property.—*Salmon v. Mills*, U. S. C. C. of App., 49 Fed. Rep. 333.

4. ATTACHMENT — Judgment in Rem.—An action of "foreign attachment" against a non-resident who is not personally served, and who does not appear, is a proceeding *in rem;* and no execution can be issued for any balance unpaid after the attached property is exhausted.—*Stanley v. Stanley*, S. Car., 14 S. E. Rep. 675.

5. BANK—Insolvency—Rights of Depositors—Set-off.—A depositor in an insolvent bank, who had indorsed a note that was subsequently discounted by said bank, can, in a suit by the bank to recover the amount of the note, set off his deposit against this amount, when the note matured after the insolvency of the bank.—*Yardley v. Clothier*, U. S. C. C. (Penn.), 49 Fed. Rep. 337.

6. BANKS—Semi annual Statements.—Under Gen. St. § 278, providing that if any banking association neglects to make a semi annual statement, within a certain time, of the condition of the bank to the State treasurer, "the directors shall be personally liable for all debts of said association, contracted previous to and during the period of such neglect," the liability of the directors is primarily and directly imposed on failure to comply with the law, and may be enforced regardless of any proceeding against the corporation.—*Larsen v. James*, Colo., 29 Pac. Rep. 183.

7. BONDS—Construction.—Where a bond is conditioned to pay plaintiffs the amounts due or to become due for labels sold or to be sold to the principal under existing contracts, and the manufacture of the labels requires the making of plates, which are useful for no other purpose, the principal and sureties are liable, after the principal orders that the labels be not printed, for the expense already incurred by plaintiff in making the plates.—*Crocker v. Field's Biscuit & Cracker Co.* Cal., 29 Pac. Rep. 225.

8. BOUNDARIES—Courses and Distances.—Where there is a conflict as to the location of land by a survey, but two corners thereof can be definitely identified, the courses and distances may be ascertained from the field-notes, and the entire survey constructed therefrom; and in such cases the distance and quantity must yield to course.—*Rand v. Cartwright*, Tex., 18 S. W. Rep. 794.

9. CARRIERS—Live-stock—Limiting Liability.—A common carrier cannot limit his common-law liability by a special contract in writing with the shipper, unless it is freely and fairly made, and the carrier cannot exact as a condition precedent for carrying stock of goods that the shipper must sign a contract in writing, limiting or changing the common law liability. If the carrier has two rates or charges for carrying stock or goods,—one, if carried under the old common-law liability; and the other, if carried under a special contract,—the shipper must have real freedom of choice in making his selection.—*Atchison, T. & S. F. R. Co. v. Dill*, Kan., 29 Pac. Rep. 148.

10. CARRIERS OF GOODS—Damages.—In an action for damages caused by delay in transporting cattle the difference in the market value of the cattle at the place of destination, at the time they should have arrived, and the time they did arrive, is the measure of damages.—*Gulf, C. & S. F. Ry. Co. v. McCarthy*, Tex., 18 S. W. Rep. 716.

11. CARRIERS OF PASSENGERS—Consolidation of Actions.—Where a railway company moves that three actions pending against it by members of the same family, for personal injuries received in the derailing of a car,

payable on the formation of the company and the issuance of the stock:" *Held*, that the corporation, when formed, could sue on such agreement as a contract made for its benefit.—*Marysville Electric Light & Power Co. v. Johnson*, Cal., 29 Pac. Rep. 126.

20. COUNTIES—Constitutional Law.—The provisions of section 2, art. 10, of the constitution, which declares that "no county shall be divided, or have any part stricken therefrom, without first submitting the question to a vote of the people of the county, nor unless a majority of all the legal voters of the county voting on the question shall vote for the same," is a restriction upon the powers of the legislature to the extent named, but is not a prohibition upon that power to require more than a majority in favor of the proposition, as three-fifths of the legal votes cast upon that question.—*State v. Nelson*, Neb., 51 N. W. Rep. 648.

21. CREDITORS' BILL—Claim for Unliquidated Damages.—Where a judgment debtor has commenced an action against another, for unliquidated damages arising out of an injury to his real estate, and the judgment creditor of such debtor thereafter, and while his judgment is alive, commences a suit, under section 5464 of the Revised Statutes, in the nature of a creditors' bill, against such debtor and the wrong-doer, to subject to the payment of his judgment the debtor's interest in the chose in action or claim for damages, the judgment creditor may acquire a lien in equity upon such interest of the debtor, from the commencement of his suit, where the demand of the judgment debtor for unliquidated damages is reduced to judgment during the pendency of the creditors' bill.—*City of Cincinnati v. Hafer*, Ohio, 30 N. E. Rep. 197.

22. CRIMINAL EVIDENCE—Dying Declarations.—On a murder trial, it appeared that deceased, in the evening of the day he was shot, and after being informed by a physician that a bullet had lodged in his brain, and that he would probably die, said he was "obliged to die," and then made a statement to persons present as to who shot him: *Held*, that such statement was admissible as a dying declaration, though deceased lived for three or four days thereafter.—*State v. Banister*, S. Car., 14 S. E. Rep. 678.

23. CRIMINAL EVIDENCE—Good Character.—Respondent having introduced evidence as to his good character, and none having been offered in rebuttal, the jury were instructed that "while the people who charge a man with crime cannot establish his guilt by proving he is a man of bad character—I say, while the law forbids the people to attack his character or bring it up in court to establish his guilt, yet it does not permit him to prove his good character or standing in life in defense:" *Held*, that respondent was prejudiced thereby, as it induced the jury to believe that the people were under disadvantage, and unable to rebut such evidence.—*People v. Marks*, Mich., 51 N. W. Rep. 638.

24. CRIMINAL LAW—Credibility of Witness.—On a trial for murder it is proper to exclude testimony as to the reputation for "truth, honesty, and integrity" of defendant, who was a witness in his own behalf, where those traits of character were not questioned by the prosecution.—*People v. Cowgill*, Cal., 29 Pac. Rep. 228.

25. CRIMINAL LAW—Forgery—Indictment—Insanity as a Defense.—Forgery of a witness certificate payable by the State is punishable under the Kentucky statute providing for the punishment of any person who "shall forge or counterfeit any writing whatever, whereby fraudulently to obtain the possession of or to deprive another of any money or property, or cause him to be injured in his estate or lawful rights," since the pronouns "him" and "his" are used in said statute as equivalent to "another" which embraces the State.—*Moore v. Commonwealth*, Ky., 18 S. W. Rep. 883.

26. CRIMINAL LAW — Homicide — Self-defense.—On a trial for murder it appeared that, just before the killing, defendant was in an open space before a stable, engaged in hitching up his employer's horse; that he and deceased had a violent altercation; and that deceased went for a pistol, and, returning, was shot by defendant: *Held*, that the place where defendant was working was not entitled to the privileges which the law accords to one's residence or place of business, but that defendant should have retreated if he could have done so safely.—*Perry v. State*, Ala., 10 South. Rep. 650.

27. CRIMINAL LAW—Homicide—Self-defense.—One who has reached for his pistol and partially drawn it from his pocket, with the remark, "By G——d, I have got you now!" is using the pistol, within Pen. Code, art. 571, providing that when a homicide takes place to prevent murder, if the weapon "used" by the party attempting or committing the murder is such as would have been calculated to produce death, it is to be presumed that the person so using it designed to kill and murder.—*Ward v. State*, Tex., 18 S. W. Rep. 793.

28. CRIMINAL LAW—Mayhem.—To show mayhem, the statutes are fully met by proof of the commission of the act, from which the law will presume, though it be done in pursuance of an intent formed during the conflict, that it was done unlawfully and maliciously, unless the evidence shows the contrary.—*People v. Wright*, Cal., 29 Pac. Rep. 240.

29. CRIMINAL PRACTICE — Grand and Petit Jurors.—Code, vol. 2, § 4, p. 132, providing that the jury commissioners of a county shall meet at a certain time, and proceed to draw for the ensuing year the requisite number of persons to serve as grand jurors, and then in like manner the requisite number to serve as petit jurors, does not allow the whole number to be drawn at one time, and the selection of grand jurors to be taken from this number, but the grand jurors must be drawn first.—*Wells v. State*, Ala., 10 South. Rep. 656.

30. CRIMINAL PRACTICE—Perjury.—An indictment for perjury, after stating the matter on which the perjury was assigned, simply recited: "Which statement, so made by T, before and to the justice of the peace as aforesaid, was willfully and deliberately false, and the said T knew the same to be false when he made it:" *Held*, that the indictment was fatally defective, in that it did not specifically negative the alleged false statement, and set out the truth in regard to the same.—*Turner v. State*, Tex., 18 S. W. Rep. 792.

31. CRIMINAL PRACTICE—Recognizance.—Under Code Crim. Proc. art. 852, prescribing as a condition of recognizances on appeal on case of misdemeanor that "A B, who stands charged in this court with the offense of, and who has been convicted of said offense in this court, shall appear before this court from day to day," etc., a recognizance which, following the words "shall appear," omits the words "before this court," is fatally defective.—*Howard v. State*, Tex., 18 S. W. Rep. 790.

32. DECREE OF DISTRIBUTION.—In a suit by a part of the distributees and heirs at law of an intestate against his administrator, the court has power, after determining the fund due from the administrator, to decree the separate sums due from such fund to the several distributees of the estate, though many of such distributees were not named as complainants in the bill.—*Thornton v. Tyson*, Ala., 10 South. Rep. 637.

33. DEED A MORTGAGE—Title Acquired.—Where land is conveyed by a deed absolute in form, but intended by the parties thereto as a mortgage, the grantee acquires no title to the land which she can transfer or assign without foreclosure.—*Adair v. Adair*, Oreg., 29 Pac. Rep. 193.

34. DEED AS MORTGAGE—Evidence.—In a suit to have a deed declared a mortgage, evidence of the grantor's wife to the effect that when she signed the deed she did not understand it to be a conveyance, that she signed it simply for the purpose of securing the grantee for his money, that it was the understanding all the time that it was to be a security, and that she was not examined apart from her husband, as stated in the certificate of acknowledgment, is inadmissible.—*Gray v. Shelby*, Tex., 18 S. W. Rep. 809.

35. DESCENT AND DISTRIBUTION.— Where, upon the final accounting of a decedent's estate, it appears that the widow's share is deficient by reason of excessive

payments made to the next of kin on a former accounting the latter may be required to refund such excess; but, in the absence of fraud or laches, interest thereon will only be allowed from the time the demand for restitution is made.— *In re Grim's Estate*, Penn., 23 Atl. Rep. 802.

36. EJECTMENT—Forged Deed—Tax Deed.—Actual possession taken by a person of 160 acres of land under an invalid tax deed, followed by the making of lasting and valuable improvements thereon and the payment of taxes for many years, gives such possessor a better title and right to the land in action in the nature of ejectment than the temporary prior possession claimed by one, under a fabricated and forged deed, who went upon the land, and, after plowing five or six furrows around a few rods, then inclosed the same with six or eight posts, and set out a few shrubs and trees.—*Redden v. Tefft*, Kan., 29 Pac. Rep. 157.

37. EJECTMENT—Tax Title.—Title to land is acquired by adverse possession for twenty years under a void tax title.—*Harrison v. Spencer*, Mich., 51 N. W. Rep. 642.

38. ELECTIONS — Australian Ballot Law.—The provisions in section 20 of the act approved March 4, 1891, known as the "Australian Ballot Law," for the marking of ballots with ink, is directory only, and ballots, if in other respects regular, will, in the absence of fraud, be counted, although marked with a pencil.—*State v. Russel*, Neb., 51 N. W. Rep. 465.

39. EMINENT DOMAIN—Compensation.—Under Gen. St. § 3464, the appraisal of damages for the taking of a strip of land along a railroad would not presumptively include damages to another and detached piece of land belonging to the owner of such strip, and that it was error to hold that the consideration for a deed of the strip to a railroad company included, as a matter of law, compensation for the damage to such other land. —*Longworth v. Meriden & W. R. Co.*, Conn., 23 Atl. Rep. 827.

40. EMINENT DOMAIN—Measure of Damages.—In proceedings to appropriate a strip of land for a right of way in which the real contest at the trial was made by tenants, for a term of years, it was error to admit testimony as to the value of the land taken and of the buildings and fruit trees thereon, since the measure of the tenant's was the amount of diminution in value of their lease because of the appropriation.—*Seattle & M. Ry. Co. v. Scheike*, Wash., 29 Pac. Rep. 217.

41. EVIDENCE—Expectancy of Life.—In an action for an allowance equivalent to an annuity for life, the annual value being given, to establish the probable longevity it was proper to allow a witness, qualified as an expert in life insurance, to use the American Mortality Table to refresh his memory, and testify that a person at the age of 81 had an expectation of 4 1-10 years.—*Shover v. Myrick*, Ind., 30 N. E. Rep. 207.

42. EVIDENCE—Opinion Evidence.—Under Hill's Code, §§ 681, 706, which provide that a witness can testify to facts only which he knows of his own knowledge, and allow the opinion of a witness to be given only in cases respecting the identity or handwriting of a person, "or on a question of science, art, or trade, when he is skilled therein," it was error to allow the plaintiff, in an action for damages for the obstruction of a navigable stream, to testify that, in her opinion, she had been damaged in the sum of $1,300.—*Burton v. Severance*, Oreg., 29 Pac. Rep. 200.

43. EVIDENCE — Res Gestæ.—A letter describing an agreement, written by one of the parties thereto, without the other's knowledge, several days after the transaction occurred, is inadmissible in evidence as part of the *res gestæ*.—*Emerson v. Mills*, Tex., 18 S. W. Rep. 805.

44. EVIDENCE—Secondary Evidence.—For the purpose of introducing secondary evidence as to the contents of a note sued upon, testimony as to its loss may be given at the trial, and the filing of an affidavit of loss is unnecessary.—*Gray v. Thomas*, Tex., 18 S. W. Rep. 721.

45. EXCHANGE—Deceit.—A statement made by a party to induce another to exchange a dwelling house for promissory notes, "that the notes were perfectly good," under the circumstances of this case is a representation, and not the expression of a mere opinion.—*Crane v. Elder*, Kan., 29 Pac. Rep. 151.

46. EXECUTION—Where a money judgment is affirmed by the supreme court, which thereupon renders judgment against the appellant and the sureties on his *supersedeas* bond, execution should issue on the judgment of the supreme court, and not on the judgment appealed from. — *Irvin v. Ferguson*, Tex., 18 S. W. Rep. 820.

47. EXECUTION — Levy on Corporate Stock.— Where the statutes provide, both by writs of garnishment and by execution, for reaching a debtor's shares of stock in a corporation, a creditor cannot sell such stock on execution without stating the number of shares, since the creditor may reach the stock by garnishment, and thereby get a sufficient description and then sell on execution.—*Keating v. J. Stone & Sons Live Stock Co.*, Tex., 18 S. W. Rep. 797.

48. EXECUTOR— Foreclosing Mortgage.— Hill's Code, § 377 providing that an action may be commenced against an executor "at any time after the expiration of six months from the granting of letters testamentary," and "until the final settlement of the estate and discharge of such executor," and "not otherwise," does not apply to a suit against an executor to foreclose a mortgage and subject the mortgaged premises to its payment; nor need the claim be first presented to him and disallowed.—*Teel v. Winston*, Oreg., 29 Pac. Rep. 142.

49. EXECUTORS AND ADMINISTRATORS.— Where in an action against an administrator after his discharge, for alleged fraud in the sale of land, and failure to account for the proceeds, it appears that the land was sold under an order of court, on a credit of 12 months, to pay a valid claim against the estate, and that the administrator never received the proceeds of such sale, there can be no recovery.—*Mason v. Rodgers*, Tex., 18 S. W. Rep. 811.

50. FEDERAL COURT—Circuit Court of Appeals.—When the circuit court obtains jurisdiction of a suit to foreclose a mortgage involving more than $2,000 by reason of diverse citizenship, it has jurisdiction to determine the priority of all liens upon the premises set up by cross-bill, regardless of the amounts claimed; and, as the jurisdiction of the circuit court of appeals is not limited to any amount, it may entertain an appeal from a decree of the circuit court on such a cross-bill, refusing to recognize a lien for less than $2,000.—*Courtney v. Pres., etc. Ins. Co. etc.*, U. S. C. C. of App., 49 Fed. Rep. 309.

51. FEDERAL COURTS—Citizenship of Corporations.— While, under acts respecting the jurisdiction of the federal courts, a corporation is a "citizen" only of the State under whose laws it was organized, yet, with respect to the district in which it may be sued, under Act Cong. March 3, 1887, a railroad or telegraph company, chartered either by a State or the United States, is an "inhabitant" of any State in which it operates its lines and maintains offices for the transaction of business.—*United States & Southern Pac. R. Co.*, U. S. C. C. (Cal.), 49 Fed. Rep. 297.

52. FEDERAL COURTS— State Statutes of Limitation.— In a suit in equity between two Minnesota corporations, to determine conflicting claims to land under grants from congress, the federal court will recognize and apply the State statute of limitations.—*St. Paul, S. & T. F. Ry. Co. v. Sage*, U. S. C. C. of App., 49 Fed. Rep. 315.

53. FIRE INSURANCE — Minor Child.—Code 1886, § 2356, allowing a father to insure his life "for the benefit of his minor child or children," does not authorize the assignment by a father of an insurance in his own name to his minor children, he being in debt at the time.— *Triedman v. Tennell*, Ala., South. Rep. 649.

54. FRAUDS, STATUTE OF—Agreements Relating to Land. —An agreement providing that defendant should advance the necessary money, and redeem the property

of plaintiff, which had been sold under a decree of foreclosure, and that, for the purpose of enabling defendant to do so, plaintiff would convey the premises to defendant, to be held by him until such time as they might be sold, is not an agreement "for the sale of real property or of an interest therein," which Civil Code, §§ 1624, 1741, declare "invalid, unless in writing."—*Byers v. Locke*, Cal., 29 Pac. Rep. 119.

55. FRAUDULENT CONVEYANCES.— Where a person indebted to a bank executes a deed of trust upon land, with the understanding that it is to be withheld from record, so as not to impair his credit, and another bank, relying upon the *indicia* of solvency thus created, extends the debtor's old notes and takes new ones, such renewals and extentions are to be regarded as valuable considerations; and the deed will be regarded as fraudulent as to them, although there may not have been any actual intent to defraud.—*Certral Nat. Bank v. Doran*, Mo., 18 S. W. Rep. 836.

56. FRAUDULENT CONVEYANCES— Preferences.—In order to avoid a conveyance whereby, it is alleged, one creditor has obtained the fraudulent preference mentioned in section 4, ch. 148, Gen. Laws 1883, it is necessary that not only shall insolvency of the debtor exist, and that the creditor shall have reasonable cause to believe it to so exist, but in addition, that the conveyance shall have been made with the view of giving a preference. — *Bauman v. Cunningham*, Minn., 51 N. W. Rep. 611.

57. FRAUDULENT VENDEE— Rights of Vendor.—Where a vendee, by fraudulent purchase, procures personal property from an innocent vendor, and then sells it to another for the consideration only of the payment of a pre-existing debt, the original vendor may treat all transfers as void, and recover, in an action against the purchaser, from the fraudulent vendee, the value of the property.— *Schulein v. Hainer*, Kan., 29 Pac. Rep. 171.

58. HOMESTEAD — Business Property.—Under Sayles' Civil St. art. 2336, providing that a homestead shall consist of land used "for the purposes of a home, or as a place of exercise the calling or business of the head of a family," a merchant abandoned his homestead in a store by renting it to a butcher, and moving into another, although he had a right to resume possession at any time, and was permitted to raise vegetables in the back part of the lot.—*Duncan v. Alexander*, Tex., 18 S. W. Rep. 817.

59. HUSBAND AND WIFE—.A *dation en paiement* between husband and wife can only be made by authentic act, and, when the consideration is explicitly stated in the act, the parties are bound thereby, and cannot make proof of other and additional consideration, unless upon allegation and clear proof of error in the confection of the act by the notary. — *Hyman v. Schlenker*, La., 10 South. Rep. 623.

60. HUSBAND AND WIFE.— Where a husband erects a building on land of his wife, the law presumes that he intended it for her benefit, and he cannot recover the value of such building either from her or her estate.—*In re Sturdevaut's Estate*, Conn., 23 Atl. Rep. 826.

61. INDIAN TERRITORY—Federal Courts— Jurisdiction. —Under Act Cong. March 1, 1889, § 6, providing that the United States courts in the Indian Territory shall have jurisdiction in civil cases "when the value of the thing in controversy or damages or money claimed shall amount to $100 or more," such courts have jurisdiction of an action for killing stock when the total amount claimed exceeds $100, though the value of each animal is less than that sum.—*Gulf, C. & S. F. R. Co. v. Washington*, U. S. C. C. of App., 49 Fed. Rep. 347.

62. INDIAN TERRITORY — Impaneling Jury.—In a civil case in the Indian Territory defendant is entitled to have a panel of 18 competent jurors from which to make his peremptory challenges, as provided by Mansf. Dig. Ark. § 4036, which is in force in the territory.—*Gulf, C. & S. F. R. Co. v. Campbell*, U. S. C. C. of App., 49 Fed. Rep. 354.

63. INJUNCTION—Jurisdiction.— Where a bill in equity alleged that defendant had the right to mine coal and other minerals under complainant's land; that, having almost exhausted such subjacent minerals, it extended the opening of its mines into adjacent, but unconnected, lands, and brought the coal therein mined to the surface of complainant's land, to be there loaded and transported; that it deposited on his land noxious refuse and foul water; and that his land was valuable for agricultural and grazing purposes,— it entitled complainant to an injunction.—*Hooper v. Dora Coal Min. Co.*, Ala., 10 South. Rep. 652.

64. INJUNCTION — Receivers. — A land grant railroad company sued to recover a large quantity of lands, divided into three classes, and by agreement of the parties a commissioner was appointed to sell the lands pending the suit, and hold the proceeds subject to its final determination. After the sale the bill was dismissed without prejudice as to one class of the lands: *Held* that, on the bringing of a new suit, it was proper to allow a preliminary injunction restraining the commissioner from paying over the money realized from the lands still in dispute, and appointing him receiver thereof.—*St. Paul, M. & M. Ry. Co. Northern Pac. R. Co.*, U. S. C. C. of App., 49 Fed. Rep. 306.

65. INTEREST. — Under the statutory provision that "written contracts ascertaining the sum due" shall bear interest at 8 per cent. "from the time when the sum is due," a note payable on demand bears interest at 8 per cent. from its date, without proof of any demand having been made. — *Henry v. Roe*, Tex., 18 S. W. Rep. 806.

66. INTOXICATING LIQUORS—Commerce between States. —Gen. Laws ch. 109, § 18, making penal the soliciting or taking orders for intoxicating liquors in the State for delivery in another State, with knowledge or reasonable cause to believe they are to be brought within the State and sold in violation of the laws thereof, is a regulation of commerce among the States, without permission of congress, and therefore void.—*Durkee v. Moses*, N. H., 23 Atl. Rep. 793.

67. JUDGMENT. — A judgment may be transferred by parol, but must be enforced in the name of the original plaintiff.—*Garvin v. Hall*, Tex., 18 S. W. Rep. 731.

68. LANDLORD AND TENANT—Tenancy at Will.— Where the landlord has actual notice that a tenant at will, who is to pay his rent monthly, is about to remove and vacate his premises without written notice, as prescribed by the statute, and the landlord brings an action against him for rent, and recovers for one month, being one rent period, after actual notice and for the full time of occupancy, such actual notice and conduct of the parties terminate the tenacy at will, and the landlord cannot recover any rent for the vacated premises, in another action, for a subsequent month or rent period.—*Betz v. Maxwell*, Kan., 29 Pac. Rep. 149.

69. LIMITATIONS — Adverse Possession.—A quitclaim deed is sufficient color of title to support a plea of title by limitation.—*Parker v. Newberry*, Tex., 18 S. W. Rep. 815.

70. LOST INSTRUMENTS — Evidence. — In ejectment, where plaintiff claimed under a lost instrument, and produced two witnesses who were present when the paper was executed, and testified at length as to its contents, by whom prepared, and how it was burned, there was no error in allowing the scrivener who prepared the paper to testify that it was a will, and not a deed.—*Morrison v. Jackson*, S. Car., 14 S. E. Rep. 682.

71. MANDAMUS TO COUNTY TREASURER.—*Mandamus* lies against a county treasurer to compel the payment of a valid warrant or order drawn on him as such treasurer, and for the payment of which he has the necessary funds applicable thereto.—*Ray v. Wilson*, Fla., 10 South. Rep. 613.

72. MARITIME LIENS—Repairs.—An owner who allows another to have full possession and management of a vessel, and thus to become the owner of the voyage, *pro hac vice*, must be presumed to consent that the vessel shall be liable for all repairs necessary to enable her to pursue the voyage, and that the special owner may

bind the vessel for this purpose.—*The Lime Rock*, U. S. D. C. (N. J.), 49 Fed. Rep. 383.

73. MARRIAGE — Validity.—A ceremony of marriage without license, and performed by an unauthorized person, and imposed on a woman by false pretenses, but believed by her to be lawful and *bona fide*, is valid for all civil purposes, unless and until avoided by the deceived person.—*Farley v. Farley*, Ala., 10 South. Rep. 646.

74. MARRIED WOMAN—Contract—Ratification.—Where land was conveyed to a married woman, and the price secured by mortgage and notes signed by her husband and herself, and she knew nothing of the conveyance to her at the time, but was fully appraised of all the facts in the transaction by her husband within four weeks thereafter, and she retained title for years, and made no offer to rescind or reconvey, it was a complete ratification of the transaction on her part, and rendered her liable on the note.—*Pattison v. Babcock*, Ind., 30 N. E. Rep. 217.

75. MASTER AND SERVANT—Contributory Negligence.—Laws 1883, p. 191, makes it unlawful for railroad companies to neglect to so block the frogs on their roads as to prevent the feet of employees from being caught therein. In an action by a switchman for personal injuries it appeared that while uncoupling cars in defendant's yard he was injured by reason of an unblocked frog. There was evidence that other frogs in the yard were unblocked, and that the yard-master had been notified of their condition some time before the accident; that the frog in question had been unblocked at least two months: *Held*, that the question of defendant's negligence was for the jury.—*Ashman v. Flint & P. M. R. Co.*, Mich., 51 N. W. Rep. 645.

76. MASTER AND SERVANT — Defective Appliances—Vice-principal.—It is the duty of an employer in all cases to furnish his employees with a reasonably safe place at which to work, and with reasonably safe instruments or tools with which to work; and, if he delegates these duties to another, such other becomes a vice-principal, for whose acts the principal is responsible.—*Kelley v. Ryus*, Kan., 29 Pac. Rep. 144.

77. MASTER AND SERVANT — Negligence — Assumption of Risk.—Where the servant has equal knowledge with the master of defects in machinery in use, for an injury resulting therefrom he cannot recover, unless it be shown that he notified the master of the same, and was induced to remain by the promise of a remedy.—*Burlington & C. R. Co. v. Liehe*, Colo., 29 Pac. Rep. 175.

78. MASTER AND SERVANT—Torts of Servant.—In a suit for damages against defendant railroad, the court instructed the jury that if defendant's engineer, for the purpose of frightening the passengers in a street car that was crossing defendant's track, unnecessarily and wantonly started his locomotive towards such street-car, thereby frightening the occupants, among which was plaintiff, who believed and had reason to believe that a collision was imminent, and, to save herself, jumped out and was injured, defendant was liable: *Held*, that the instruction was error, the alleged injury having resulted from an act of the engineer which was not within the scope of his employment.—*Stephenson v. Southern Pac. Co.*, Cal., 29 Pac. Rep. 234.

79. MECHANIC'S LIENS.—Where a vendor advances money to his vendee, and, by written contract, agrees to convey the land as soon as foundations for a house shall be constructed thereon by the vendee, and take a mortgage for the land and advances, the vendee has "authority," before the delivery of the deed, to create liens on the land for labor and materials used in the construction of such house under Pub. St. ch. 191, § 1.—*Carew v. Stubbs*, Mass., 30 N. E. Rep. 219.

80. MECHANIC'S LIEN—Foreclosure.—When owners of adjoining lots jointly contract for the erection of one building upon the entire tract, they may be joined as defendants in a suit to foreclose a mechanic's lien on such building.—*C. B. Carter Lumber Co. v. Simpson*, Tex., 18 S. W. Rep. 812.

81. MECHANIC'S LIENS — Limitations.—All mechanics' liens for labor performed and material furnished in the construction of a building date from the commencement of the building, and not from the date of the first item in the account. The act of furnishing or placing on the ground some material that is afterwards used in the construction of the building is not the "commencement of the building." The digging of the cellar or the excavation for the foundation is the commencement of the building, within the intention and meaning of the statute.—*Kansas Mortg. Co. v. Weyerhaeuser*, Kan., 29 Pac. Rep. 153.

82. MECHANIC'S LIEN — Material-man.—Where one sells material to a contractor on the credit of the structure to be erected, the fact that the material, while in the contractor's hands, is sold by the sheriff for the benefit of the contractor's creditors, would not divest any lien for the material.—*Linden Steel Co. v. Imperial Refining Co.*, Penn., 23 Atl. Rep. 800.

83. MECHANICS' LIENS—Property Subject to.—Where material is purchased with the understanding of both parties that it will be used for the erection of a particular building in a certain town, a lien will attach to the lot on which the house is built, although the precise location of the lot was not mentioned in the contract, and although the vendor did not know the exact description of such lot at the time the contract was made.—*Wilson v. Howell*, Kan., 29 Pac. Rep. 151.

84. MECHANIC'S LIEN—Statement.—A statement of a mechanic's lien, under section 632 of the Code (Comp. Laws 1885), that does not charge some particular person by name as the owner of the property upon which a lien is sought to be taken, is valid, and does not create a lien.—*Blattner v. Wadleigh*, Kan., 29 Pac. Rep. 165.

85. MINING CLAIMS—Contest.—Since, under Rev. St. U. S. § 2326, relating to proceedings for the determination of the title to mining property, and providing that in case neither party establishes title thereto the jury shall so find, and judgment shall be entered accordingly, neither party is entitled to judgment unless his title is established, an instruction that plaintiff must in such a case prove his title by a fair preponderance of the evidence, and that, if the evidence be equally balanced, defendant is entitled to recover, is erroneous.—*Becker v. Pugh*, Colo., 29 Pac. Rep. 173.

86. MORTGAGES—Foreclosure.—Where one of the defendants in a mortgage foreclosure, other than the mortgagor, answers and sets up a title paramount to that of the mortgagor and mortgagee, such title cannot be litigated in the foreclosure suit, and the judgment will be so modified as not to prejudice the rights of the claimant of such paramount title.—*Cody v. Bean*, Cal., 29 Pac. Rep. 223.

87. MUNICIPAL ASSESSMENT—Collection.—Act May 24, 1873, § 14, provides that the council of a borough may cause sewers to be constructed, and make assessments therefor; that when the assessment is made and approved it shall become a lien on the benefited property, and, after notice, be collected by the solicitor of the borough: *Held*, that an action of *assumpsit* would not lie to enforce such collection, there being no provision therefor in the act.—*Borough of McKeesport v. Fidler*, Penn., 23 Atl. Rep. 799.

88. MUNICIPAL CORPORATION — Grading Streets.—A municipal corporation cannot alienate the express and plenary powers to grade and improve its streets, granted to it by the legislature; therefore a contract with a gas company, based on a valid consideration, allowing the company to lay pipes in the streets, does not divest the municipality of power to lower the grade of its streets, and, if necessary, to remove as nuisances the pipes thereby exposed to view.—*Roanoke Gas Co. v. City of Roanoke*, Va., 14 S. E. Rep. 665.

89. MUNICIPAL CORPORATION—Obstruction in Sidewalk.—In an action against a city for personal injury resulting from a stump which was left standing in the sidewalk so as to be a dangerous obstacle, defendant was properly precluded from proving that the person who

cut down the tree left the stump with a view of making it a hitching post, and that other stumps had been left for like purpose in the city, and that hydrants, hitching posts, stepping stones, water plugs, and ash barrels, for the convenience of residents, were to be found at like places upon the streets.—*City of Newport v. Miller*, Ky., 18 S. W. Rep. 835.

90. NEGOTIABLE INSTRUMENTS—Forgery.—Where the defenses to an action on a note were that it was a forgery, and that plaintiff was not a *bona fide* holder, it was error to enter judgment for defendant on a general verdict in his favor when the jury failed to agree upon a special issue submitted to them as to the genuineness of the note.—*Tourtellotte v. Brown*, Colo., 29 Pac. Rep. 130.

91. PARTNERSHIP—Trust for Trading Purposes.—Where a daughter conveys property in trust to her father, to be used by him in a mercantile business, the father, daughter, and her brothers each to receive a one-ninth interest, and the property to be divided when the youngest becomes 25 years old, and none of the brothers have power to control or withdraw their several interests, and after the father's death one of the brothers is appointed trustee by the court, the beneficiaries do not constitute a partnership.—*Connally v. Lyons*, Tex., 18 S. W. Rep. 799.

92. PLEADING—Corporations.—Code Wis. § 4199, making it unnecessary, when a corporation is a party, to prove its corporate existence unless the same is "specifically denied" by a verified pleading, does not render insufficient a direct denial upon information and belief.—*Michigan Ins. Bank v. Eldred*, U. S. C. C., 12 S. C. Rep. 450.

93. PLEADING—Joinder of Causes.—A declaration contained three counts, the first of which was in trover for conversion of goods, while the others each recited that plaintiff was the lessee of a certain room, the property of defendants, and that defendants fastened up the door of the room, and prevented plaintiff from entering: *held*, that there was a misjoinder of counts.—*Haines v. Beach*, Mich., 51 N. W. Rep. 644.

94. PRACTICE—Death of Party—Substitution.—Under Code Civil Proc. § 385, which provides, *inter alia*, that, "in case of the death or any disability of the party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or succession in interest," the substitution will be made on suggestion of the death of a party, and on *ex parte* motion showing the appointment and qualification of an executor or administrator.—*Campbell v. West*, Cal., 29 Pac. Rep. 219.

95. PRINCIPAL AND AGENT — Ratification.—Where a party acting has no authority to act for a third party, and does not profess at the time to act for him, the subsequent assent of such third party to be bound as a principal has no operation. A ratification is only effectual when the act is done by a person professedly acting as the agent of the party sought to be charged as principal.—*Mitchell v. Minnesota Fire Ass'n*, Minn., 51 N. W. Rep. 608.

96. PROHIBITION—When Granted.—Under Hill's Code, § 1635, providing that on appeals from justices of the peace "the issue shall be tried in the superior court without other or new pleadings, unless otherwise directed by the court," superior courts have discretionary power to permit amendments of pleading in such cases, and a writ of prohibition will not issue to restrain such court from proceeding to trial of a case brought up on appeal from a justice, wherein the plaintiff was permitted to file an amended affidavit.—*State v. Superior Court of King County*, Wash., 29 Pac. Rep. 213.

97. QUIETING TITLE—Bona Fide Purchaser.—A bill to quiet title alleged that a husband was in possession of complainant's land under a written agreement to pay the taxes thereon, and that his wife purchased such land at a public tax sale on her own account, and with her own money, with knowledge of the agreement, and sold to a third person: *Held* that, though the purchase of the land is sufficient to excite suspicion, it was not sufficient from which to infer fraud or unfair dealing, in the absence of any pleading alleging it.—*Willard v. Ames*, Ind., 30 N. E. Rep. 210.

98. QUO WARRANTO AGAINST MUNICIPAL CORPORATION. The information will lie directly against a *de facto* or pretended municipal corporation for the usurpation of corporate franchises, or to oust it from the enjoyment of the privileges thereof.—*State v. Tracy*, Minn., 51 N. W. Rep. 613.

99. RAILROAD COMPANIES—Accidents at Crossing.—On approaching a street crossing of a railroad track, it is the duty of a traveler to exercise his senses of sight and hearing, and look and listen for an approaching train. His failure so to do is negligence, which, in case of collision, will prevent his recovery of damages for injuries sustained.—*Herlish v. Louisville, etc. R. Co.*, La., 10 South. Rep. 628.

100. RAILROAD COMPANIES—Killing Stock.—In an action for killing stock in the Indian Territory it was error to refuse an instruction that the company owed the owner no duty except to use ordinary care to avoid injuring the stock after the engineer discovered it upon the track, or after he might have discovered it by the use of ordinary and reasonable care.—*Gulf, etc. R. Co. v. Ellridge*, U. S. C. C. of App., 49 Fed. Rep. 356.

101. RECEIVERS—Right to Sue.—A foreign receiver will not be refused recognition as a suitor in our courts, even if a claim of one of our own citizens will be injuriously affected thereby, if said receiver prosecutes solely in behalf of a party who is also a citizen of this State.—*Falk v. Janes*, N. J., 23 Atl. Rep. 813.

102. REMOVAL OF CAUSES—Bond.—The *supersedeas* bond, on the removal by writ of error of a cause from the State supreme court to the United States Supreme Court, conditioned that appellant "shall prosecute his writ to effect, and answer all damages if he shall fail to make good his plea," does not require the payment of appellee's attorney fee, where the writ was dismissed by the federal court for want of jurisdiction.—*Kellogg v. Howes*, Cal., 29 Pac. Rep. 230.

103. REMOVAL OF CAUSES—Federal Question—Mining Acts.—Whether a certain mine is a "vein," "lode," or "ledge," within the meaning of Rev. St. U. S. §§ 2320, 2322, 2325, is a question of fact to be determined from the use of those terms among practical miners, and the decision thereof involves no federal question, within the meaning of the removal of causes acts.—*Blue Bird Min. Co. v. Largey*, U. S. C. C. (Mont.), 49 Fed. Rep. 289.

104. SALE—Conditional.—Rev. St. 1879, § 2505, cl. 2, providing that no sale of chattels, where possession is delivered to the vendee, shall be subject to any condition whatever as against creditors of the vendee, or subsequent *bona fide* purchasers, unless such condition shall be evidenced by writing and recorded, applies to prior as well as subsequent creditors.—*Collins v. Wilholt*, Mo., 18 S. W. Rep. 889.

105. SALE—Damages.—Where cattle are sold and delivered upon a promise to execute a note due in nine months for the price, the vendee's refusal to execute such note constitutes a breach of contract which gives the vendor an immediate right of action.—*Young v. Garrett*, Tex., 18 S. W. Rep. 819.

106. SALE—Payment—Mistake.—Where the owner of cattle entered into a contract to sell the same for a stated price, and the purchaser, relying upon such statement, purchases the cattle at the price stated, and pays the money therefor and takes a bill of sale at the time, the contract is concluded between the parties, and is binding upon both, although the seller made a mistake in calculating his figures as to the price of the cattle before he made his offer to the purchaser.—*Griffin v. O'Niel*, Kan., 29 Pac. Rep. 143.

107. SALE OF LAND—Specific Performance.—Specific performance of a contract for the conveyance of land (which the buyer is not bound to buy) will not be decreed when the contract of the buyer has been adapted to induce and has induced the seller to infer an abandonment of the option to buy, and by acting upon such inference the seller has been injured, an abandonment

of the option will be deemed to be thus established.—*Meidling v. Trefz*, N. J., 23 Atl. Rep. 824.

108. STATE AND FEDERAL COURTS—Conflict of Jurisdiction.—A State court has no authority to enjoin the proceedings of a federal court, or of the parties thereto, in a suit in which the federal court has first acquired jurisdiction of the controversy and the *res*.—*Central Nat. Bank of Boston v. Hazard*, U. S. C. C. (N. Y.), 49 Fed. Rep. 293.

109. TAXATION—Examination of Records.—A dealer in tax titles is engaged in a lawful business, has the same right as any other citizen to inspect and examine the State land tax book, and may enforce his right, if necessary, by a writ of mandate.—*Atcheson v. Huebner*, Mich., 51 N. W. Rep. 634.

110. TAXATION—Intentional Under-assessment. — An under-assessment of taxable property, intentionally made by the assessing officer, is invalid whether it was the result of an agreement with the owners of the property under-assessed, or of the officer's disregard of duty. —*Auditor General v. Jenkinson*, Mich., 51 N. W. Rep. 643.

111. TAXATION—Omitted Property.—Where one has, on his return for taxation of personal property, put down a certain valuation against the item "all money loaned by me, either on time or on call," and this has not been changed by the auditor, and has, therefore, by the provisions of Rev. St. 1882, § 6330, been adopted by him, and the taxes have been assessed on the returns so made, the auditor cannot, under the authority given him by Rev. St. 1881, § 6416, to assess property omitted from assessment in any previous year, reassess the property so returned.—*Du Bois v. Board of Com'rs of Lake County*, Ind., 30 N. E. Rep. 206.

112. TAXATION—Sale — Collusive Purchase.—Where property is sold for taxes, and is purchased for 1 per cent. of its value by the husband and trustee of the owner, in the name of their daughter, but the trustee continues for five years to control the property and collect the rents, a decree that the original owner is still the real owner is proper in a suit by the daughter to enjoin the sale of the property for older taxes assessed against it.—*Thorington v. City Council of Montgomery*, Ala., 10 South. Rep. 634.

113. TAXATION — Tax deed to County — Validity. — A tax-deed, issued to the county in pursuance of the acts of 1879 and 1885, when in appropriate form, and properly executed and recorded, conveys to the county as good title as is conveyed by a similar deed to a cash purchaser under like circumstances. The form of deed prescribed for cash purchasers should be substantially followed as far as its terms are applicable to the county as a bidder, and be varied only so far as may be necessary to show the truth of the transaction in substance. —*Dyke v. Whyte*, Colo., 29 Pac. Rep. 128.

114. TAX-DEEDS—Averments as to Sale.—Where a tax-deed conveys title to several tracts of land, and the deed shows that the several tracts were advertised separately, and that the purchaser offered to pay for them separately, this is sufficient to show that they were sold separately. — *Waddingham v. Dickson*, Colo., 29 Pac. Rep. 177.

115. TRESPASS TO TRY TITLE—Evidence of Inheritance. —In trespass to try title, where plaintiff claims under persons claiming to be heirs of a former owner, the question whether they were in fact such heirs must be determined by the law in force of the time of the death of the ancestor.— *Lindsey v. Freeman*, Tex., 18 S. W. Rep. 727.

116. TRUST-DEED— Evidence. — In an action in which a deed of trust is attacked by a creditor of the grantor, the deed of trust, and the note which it purports to secure, are admissible in evidence, where independent evidence of the existence of a valuable consideration to support such instruments is subsequently introduced.—*Howell v. Bowman*, Ala., 10 South. Rep. 640.

117. TRUSTS—Requisites of Deed. —The declaration of a trust or a power in trust must be reasonably certain in its material terms, and this requisite of certainty includes the subject-matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of the estate which they are to have, and the manner in which the trust or trust power is to be executed.— *Atwater v. Russell*, Minn., 51 N. W. Rep. 629.

118. VENDOR AND VENDEE — Damages.— Plaintiff purchased of defendant a block consisting of 22 lots, and received a warranty deed. The lots were represented on a plat, which defendant exhibited to plaintiff, as being 25 feet wide and 100 feet deep. In having the block surveyed some time after the purchase the plaintiff discovered that, owing to some mistake in the original plat, the eastern tier of lots were short about 60 feet: *Held*, that plaintiff had an action for damages regardless of whether the representation was made knowingly or by mistake.—*Sears v. Stinson*, Wash., 29 Pac. Rep. 205.

119. VENDOR AND VENDEE — Parol Evidence. — It is competent for a vendee of land to prove by parol that an oral agreement, contemporaneous with the contract of sale, whereby the vendor was to retain 40 acres of the land, and let the vendee have 80 cords of wood in consideration thereof, was omitted by the third person who drew the contract.—*Pishkos v. Wortek*, Tex., 18 S. W. Rep. 738.

120. WATER COMPANIES — Pipes in Streets.—A water company, in the exercise of its power, under its charter, to open streets for the purpose of laying pipes, "provided, that, when the same shall be opened for that purpose, they shall, as soon as practicable, be repaired by the said company at their own cost and expense, subject to the approval of the superintendent of police of said town or the common council thereof," is not within an ordinance of such city providing that no person shall break or dig up any portion of a street "without first having obtained the written permission of the mayor, and depositing with the city treasurer such sum as the committee on streets may deem sufficient to repair the street."—*Wheat v. City Council of Alexandria*, Va., 14 S. E. Rep. 672.

121. WATER-RIGHTS — Abandonment. — Defendants claimed title to a water-right through a company that had absolutely abandoned the right for more than 20 years immediately prior to the time when defendants attempted to assert ownership. During all this time plaintiff had the rights of riparian owner, and most of the time appropriated it to particular uses: *Held*, that abandonment had destroyed the right claimed by defendants.—*Kirman v. Hunnewill*, Cal., 29 Pac. Rep. 124.

122. WHARVES AND WHARFINGERS.—Duty to Dredge.— The city is liable for injury to boats occasioned by its failure to remove at reasonable intervals the accumulations from drains at public wharves to which boats are invited, and at which the city collects wharfage.—*The Dave and Mose*, U. S. D. C. (N. Y.), 49 Fed. Rep. 389.

123. WILLS—Codicil. — A certain will and codicil construed, and *held*, that it was the intention of the testator by the codicil to substituted to the residuary bequest in the will, in lieu of the legatee mentioned in it, a new beneficiary brought in by the codicil, although that instrument made no express reference to the residuary clause in the will. — *Atwatter v. Russell*, Minn., 51 N. W. Rep. 624.

124. WILL—Intestacy.— A clause in a will devising "to each of my heirs at law the sum of one dollar" will not take the will out of the operation of a statute which provides that a testator shall be deemed to die intestate as to such child or children, or, in case of their death, descendants of such child or children, "not named or provided for" in his will.— *Boman v. Boman*, U. S. C. C. of App., 49 Fed. Rep. 329.

125. WILLS—Undue Influence.—The exercise of undue influence over a testator must be proved by affirmative evidence, apart from his declarations or admissions, which are only pertinent to show the effect of such influence upon his mind.— *In re Hess' Will*, Minn., 51 N. W. Rep. 614.